UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT C. MUNOZ, Petitioner, TARLTON AND SON, INC., Intervenor, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 16-71915 Board Case Nos. 32-CA-119054 32-CA-126896
TARLTON & SON, INC., Petitioner, ROBERT C. MUNOZ, Intervenor, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 17-70532 Board Case Nos. 32-CA-119054 32-CA-126896

NATIONAL LABOR RELATIONS BOARD, Petitioner, ROBERT C. MUNOZ, Intervenor, v. TARLTON & SON, INC., Respondent.	Case No. 17-70632 Board Case Nos. 32-CA-119054 32-CA-126896

OPPOSITION TO MOTION OF NATIONAL LABOR RELATIONS BOARD TO LIFT ABEYANCE, SUMMARILY GRANT TARLTON & SON'S PETITION FOR REVIEW AND DENY THE BOARD'S CROSS-APPLICATION FOR ENFORCEMENT IN PART, SEVER AND REMAND TO THE BOARD THE REMAINING PORTIONS OF THE BOARD'S ORDER, AND SUMMARILY DENY MUNOZ'S PETITION FOR REVIEW

1. Petitioner Robert Munoz opposes the Motion of the National Labor Relations Board ("NLRB" or "Board"). The Supreme Court's decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444, 584 U.S. ___ (May 21, 2018), has only a limited effect upon the issues in this case for reasons discussed below.

The Opening Brief of the Petitioner has been filed, raising many issues concerning the "mutual arbitration policy barring employees from concertedly pursuing work-related claims in any form, arbitratable or judicial." Board's Mot. to Lift Abeyance, 2 (citing *Tarlton & Son, Inc.*, 363 N.L.R.B. No. 175 (Apr. 29, 2016)).

This case involves, as pointed out by the Board, a "mutual arbitration policy" which bars the employees "from concertedly pursuing work-related claims in any form, arbitrable or judicial." The Supreme Court has now resolved a limited subset of the issues raised in this case.

Epic Systems dealt with three cases. *See Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444, 584 U.S. ___ (May 21, 2018). *See also NLRB v. Murphy Oil USA, Inc.*, No. 16-307, and *Ernst & Young LLP v. Morris*, No. 16-300, in addition to *Epic Systems*. Each of those cases, however, was a statutory collective action authorized by statute under the Fair Labor Standards Act, 29 U.S.C. § 216(b). Each of the statutory collective actions authorized involved a federal law, the Fair Labor Standards Act, and the lawsuits involved employees in many states. The Supreme Court's decision in *Epic Systems* is limited only to such federal claims and only to "collective or class actions." The Court, in discussing class actions, referred to the procedures established by Federal Rule of Civil Procedure 23. The Court addressed nothing else. The Court relied exclusively upon its reasoning that the Federal Arbitration Act, 9 U.S.C. §§ 2, 3 and 5, overrode the statutory provisions in the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157 and 158(a)(1).

Epic Systems is thus limited to those concerns. The case before this Court is considerably broader and different.

2. *Tarlton & Son* involves the employer's implementation of a mutual arbitration policy in the face of a state law class action alleging wage and hour issues under California law. No federal law claim exists.

Moreover, the policy that the employer implemented went well beyond prohibiting just class actions or any statutory collective action under the Fair Labor Standards Act. It prohibits employees from "concertedly pursuing work-related claims in any form, arbitrable or judicial." The Supreme Court was not asked to and did not consider whether an arbitration agreement could prohibit pursuit of claims in any forum. Its rationale was limited to the concerns about prohibiting arbitrable waivers of statutorily created procedures, such as collective actions under the Fair Labor Standards Act or class actions under Federal Rule of Civil Procedure 23. The Court addressed no other issue. For example, the Court did not

address the possibility that two or more employees would bring a Fair Labor Standards Act claim to the Department of Labor jointly or file a lawsuit jointly which did not seek collective action status under 29 U.S.C. § 216(b).

None of these issues are in the *Tarlton* case since, as we have noted, there is no statutorily created collective action under the Fair Labor Standards Act and no class action under the federal law present. More importantly, the arbitration policy goes well beyond prohibiting class action because it prohibits any concerted effort in any forum other than arbitration. It would prohibit two employees from together bringing a claims or claims to the California Labor Commissioner, or any agency, including state or federal agencies.

3. Fundamentally, the Federal Arbitration Act does not even apply, as fully briefed in our Opening Brief. *See* Munoz Opening Br. 6-18, DktEntry 32. Moreover, as noted in our Opening Brief, an Administrative Law Judge of the National Labor Relations Board accepted this argument that the Federal Arbitration Act does not apply, although the Board in its Decision did not expressly rely on the argument or reject it. *See Hobby Lobby Stores, Inc.*, 363 N.L.R.B. No. 195 (May 18, 2016), *petition for review filed*, No. 16-3162 (7th Cir. 2016).

Additionally, as to the truck driver employed by Tarlton, that employee is also excluded from the reach of the Federal Arbitration Act as a transportation worker. *See* Munoz Opening Br. 18, DktEntry 32.

The brief also raises a number of other issues why the Federal Arbitration Act cannot apply to all claims that could be brought in all *fora*. We recognize that *Epic Systems* forecloses that argument as to statutory collective actions under the Fair Labor Standards Act or class actions under federal law. It may arguably extend to class actions under state law, provided the transaction at issue affects commerce. It does not extend, however, to many other claims that can be brought in various *fora*, including many claims that can be brought under California law,

which is where Tarlton & Son is located. Our Opening Brief addresses these issues in greater detail. *See* Munoz Opening Br. 23-28, DktEntry 32. Indeed, this Court has even reaffirmed the proposition that the Federal Arbitration Act does not preempt certain state law claims that the mutual arbitration policy at issue would prohibit. *See Sakkab v. Luxottica Retail N. Am., Inc*., 803 F.3d 425 (9th Cir. 2015).

4. In summary, as reflected in our Opening Brief, there are many issues that are clearly untouched and unresolved, under a fair reading of *Epic Systems*. These issues are all squarely presented to this Court.

The Board is thus simply wrong that *Epic Systems* governs completely the enforceability of Tarlton's mutual arbitration policy. *See* Board's Mot. to Lift Abeyance, 4 ¶ 4.

5. The Board retreats to the argument that initially Munoz was aggrieved because the remedy was inadequate. If the Board's motion to strike or motion for summary grant of the employer's Petition for Review is granted, Munoz will be even more aggrieved by the lack of any remedy. The aggrievement remains on the remedy issue and cannot be foreclosed.

Moreover, as is obvious from the Board's Motion, it seeks an order that would cause Munoz even greater aggrievement because there would be no remedy for the maintenance of the policy. While we recognize this is an unusual posture, where Petitioner was not aggrieved initially by the Board's Order to rescind the mutual arbitration policy in its totality, as we have pointed out, *Epic Systems* has only a limited impact upon the scope of the mutual arbitration policy. It only sanctions the mutual arbitration policy to be enforced against federal law claims where there is a statutory collective action procedure, such as under the Fair Labor Standards Act or the claims brought under Federal Rule of Civil Procedure 23. It has no import beyond that.

Munoz thus remains aggrieved as to the remedy and is further aggrieved by the current position of the Board that there is no remedy or violation in the maintenance of the mutual arbitration policy.

6. Finally, the Board retreats to a reliance on the theory noted in footnote 2 of its Decision, "that a charging party cannot enlarge upon or change the General Counsel's theory of a case." Nothing of the sort happened in this case, and that issue can be more thoroughly briefed to the Merits Panel.

In any case, the short answer is that the General Counsel's theory was always that the mutual arbitration policy violated the National Labor Relations Act. In this case, as well as in the case in the Supreme Court, the General Counsel argued that the Board has a long history, which was undisputed by the Court, of prohibiting employer policies that limit the right of employees to concertedly bring claims in any *fora*. Thus, there is a long history of the Board finding that the employer policies forbidding the bringing of actions before administrative agencies on a concerted basis, including retaliation against employees who did so, were unlawful. The Charging Party's submission to the Board was thus consistent with the General Counsel's theory of the case that the mutual arbitration policy violated section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). There was nothing inconsistent or different from the General Counsel's theory.

The General Counsel moreover did not object in any way to the arguments made by the Charging Party. The General Counsel did not assert to the Board that the Charging Party's arguments varied the Complaint or went beyond the theory of the Complaint.

It also is clear that the Charging Party's arguments responded to the arguments of the Respondent employer. That is, the Respondent employer justified its mutual arbitration policy, relying upon the Federal Arbitration Act. Thus, the Petitioner's position was in response to the legal defense raised by the Respondent which has, in part, prevailed in the Supreme Court. Thus, the

Petitioner was not varying the theory of the Complaint, but rather was responding to the legal arguments made by the employer as the Respondent before the Board and now in this Court. That position did not change in any respect the General Counsel's theory of the case, it supported the theory by arguing against the Respondent's theory of defense.

In this regard, it is important to note that the arguments made by the Petitioner involve the interpretation of federal statutes such as the Federal Arbitration Act. As the Supreme Court made clear in *Epic Systems*, the Board has no expertise in interpreting other statutes, and the courts show no deference to the Board's interpretation of those statutes, other than the National Labor Relations Act. Thus, the Board has no ability to claim that a party to a proceeding, whether it is a Charging Party, Intervenor or Respondent, cannot make arguments based upon other statutes, including federal statutes or state law statutes.

Finally, the one case cited by the Board, *Kimtruss Corp.*, 305 N.L.R.B. 710 (1991), is substantially different. In that case, the Charging Party raised an issue that was contrary to the General Counsel's theory of the case, not in support of the case. The Union asserted that there had been an unlawful unilateral change while the General Counsel took the contrary position that there was no unlawful unilateral change and thus the Union's theory was "at variance" with the General Counsel's Complaint. *Id*. at 711.[1] That single case does not undermine the right of the Petitioner in this case to make arguments that are consistent with the General Counsel's theory from the beginning that the mutual arbitration policy violates the rights of employees under section 7 of the NLRA, 29 U.S.C. § 157.

7. Finally, the Board points out that there is a remaining issue concerning whether the employer's implementation of the mutual arbitration policy in the face of the concerted activity of filing a state court lawsuit violates the Act.

[1] The Board did not hold that these issues were outside the General Counsel's Complaint in *Hobby Lobby*, 363 N.L.R.B. No. 195.

It suggests that that issue should be remanded to the Board so the Board may consider that decision in light of *Epic Systems*. That request should be rejected. It should be rejected because this Court is still faced with the remaining issues raised above, and to sever that particular issue and remand to the Board would be inappropriate until the remainder of these issues are resolved by this Court. If this Court finds that, for example, the Federal Arbitration Act does not apply to Tarlton's employees or to its truck driver, then there would be no reason to remand that issue. Moreover, the Board's resolution of that issue will depend on how the Court treats the other issues raised by Petitioner.

The Court could, alternatively, depending upon its treatment of the other issues, grant the Petition for Review filed by Petitioner or take other appropriate action, including in its merits decision, and remand that issue to the Board. It is premature to sever that issue out. In any case, the Respondent's Petition for Review should not be granted, the case should be returned to the Board for its response to the issues raised in this case.

8. In conclusion, *Epic Systems* is of limited import to this case. There are many other issues that need to be resolved, including the core issue of whether the Federal Arbitration Act even applies. The Board's Motion should be denied, and the Court should set a briefing schedule to allow the Respondent and the Board to complete their briefs. The Intervenor will elaborate further on the application of *Epic Systems* in any reply brief that it files. Alternatively, the Court could direct the Petitioner to refile the Opening Brief and address the issues raised by *Epic Systems*. It believes, however, it has sufficiently addressed the limited reach of

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Epic Systems in this Opposition to enable to the Board and Tarlton & Son to address those issues in their briefing.

Dated: June 14, 2018

WEINBERG, ROGER & ROSENFELD
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By: */s/ David A. Rosenfeld*
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), Petitioner certifies that its Opposition to Motion of National Labor Relations Board To Lift Abeyance, Summarily Grant Tartlton & Son's Petition for Review and Deny the Board's Cross-Application for Enforcement In Part, Sever and Remand to the Board the Remaining Portions of the Board's Order, snd Summarily Deny Munoz's Petition for Review contains 2,154 words of proportionally spaced, 14 point type, the word processing system used was Microsoft Word 2010.

Dated: June 14, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: */s/ David A. Rosenfeld*
David A. Rosenfeld

Attorneys for Petitioner and Intervenor, ROBERT MUNOZ

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on June 14, 2018, I electronically filed the foregoing **OPPOSITION TO MOTION OF NATIONAL LABOR RELATIONS BOARD TO LIFT ABEYANCE, SUMMARILY GRANT TARTLTON & SON'S PETITION FOR REVIEW AND DENY THE BOARD'S CROSS-APPLICATION FOR ENFORCEMENT IN PART, SEVER AND REMAND TO THE BOARD THE REMAINING PORTIONS OF THE BOARD'S ORDER, AND SUMMARILY DENY MUNOZ'S PETITION FOR REVIEW** with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on June 14, 2018.

/s/ Karen Kempler
Karen Kempler